88-1115

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

Docket No.

IN THE

Supreme Court of the United States

October Term, 1988

DEBRA JO WILMOTH,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON APPEAL FROM
THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Robert L. Samuel, Jr.
Stephen C. Swain
CLARK & STANT, P.C.
900 Sovran Center
One Columbus Center
Virginia Beach, Virginia 23462
(804) 499-8800

Counsel for Petitioner

80pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court's denial of bail pending Appeal deprive the Petitioner of her liberty without due process of law?

2. Did the Trial Court's denial of bail pending Appeal constitute excessive bail and cruel and unusual punishment?

PARTIES TO THE PROCEEDINGS

The Petitioner is Debra Jo Wilmoth. The Respondent is the Commonwealth of Virginia.

TABLE OF CONTENTS

	Page
Questions Presented for Review. . . .	2
Parties to the Proceedings.	2
Reports of Opinions Delivered in the Court's Below.	4
Jurisdictional Grounds.	5
Constitutional Provisions and Statutes Involved	5
Statement of the Case	7

Argument. 9

Conclusion. 14

Proof of Service. 14

Affidavit for Proof of Mailing. . . . 15

Appendix:

Transcript of Proceedings 1

Order Deferring Issuance of Mandate. 2

Judgment Appealed From. 3

Related Decisions Below 4-8

Code of Virginia § 19.2-319 . . . 9

Code of Virginia § 19.2-120 . . . 10

Petition for Appeal in Virginia Court of Appeals . . . 11

TABLE OF AUTHORITIES

Page

Sellers v. United States, 21 L. Ed. 2d 64, 66, 89 S. Ct. 36 (1968) 10

Donnell v. Commonwealth, 6 Va. App. 225 (1988). 11

CONSTITUTION AND STATUTORY PROVISIONS

	Page
United States Constitution, Fifth Amendment	5
United States Constitution, Eighth Amendment	6
Virginia Constitution, Article 1, Section 1	6
Virginia Constitution, Article 1, Section 9	7
Code of Virginia § 19.2-120	7
Code of Virginia § 19.2-319	7

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Supreme Court of Virginia denying Petitioner's petition for rehearing is contained in the Appendix, Page 3. All other relevant opinions by the Court of Appeals of Virginia and the Supreme Court of Virginia are contained in Appendix, Pages 2 through 8.

JURISDICTIONAL GROUNDS

The judgment of the Supreme Court of Virginia revoking Petitioner's bond was entered on September 22, 1988. (Appendix, Page 6). Rehearing was denied by Order of the Supreme Court of Virginia entered October 21, 1988. (Appendix, Page 3). The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution which provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the Land or Naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment of the United States Constitution which provides: Excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted.

3. Article 1, Section 1 of the Virginia Constitution which provides: That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

4. Article 1, Section 9 of the Virginia Constitution which provides: That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment be inflicted; that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require; and that the general assembly shall not pass any bill of attainder, or any ex post facto law.

5. Section 19.2-120 of the Code of Virginia: (Appendix, Page 10).

6. Section 19.2-319 of the Code of Virginia: (Appendix, Page 9).

STATEMENT OF THE CASE

Petitioner was tried on an indictment alleging the first degree murder of her husband in the Circuit Court for the City of Virginia Beach, Virginia. The trial by jury began on May 31, 1988 and concluded on June

9, 1988 with the finding of guilty of the lesser included offense of voluntary manslaughter and a recommendation of a ten-year penitentiary sentence. On July 7, 1988 the trial court imposed the recommended penitentiary sentence.

Immediately following the imposition of sentence the Petitioner, by her counsel indicated an intention to apply for a Writ of Error to the Court of Appeals of Virginia and pursuant to Section 19.2-319 (Appendix, Page 9) of the Code of Virginia requested the Court to allow her to remain free on bond pending appeal. The constitutional issues raised were due process, excessive bail and unusual punishment grounds (Appendix, Page 1 - Transcript of Proceedings Pages 7 - 9). The Trial Court denied Petitioner's request for bail and Petitioner filed a Motion for Review of Denial of Bond. The Motion was granted by the Court of Appeals of Virginia by Order entered July 29, 1988 (Appendix,

Page 8). The Commonwealth of Virginia's prosecuting authority for the City of Virginia Beach, the Commonwealth's Attorney, appealed this decision to the Virginia Supreme Court. By Order dated September 22, 1988 (Appendix, Page 6), the Virginia Supreme Court reversed and remanded the case to the Court of Appeals for revocation of the Petitioner's bond. Petitioner's Petition For Rehearing was denied by the Virginia Supreme Court by Order entered October 21, 1988 (Appendix, Page 3). The Virginia Supreme Court by Order entered November 15, 1988 (Appendix, Page 2), has deferred issuance of mandate until final determination of the Petitioner's Petition for Writ of Certiorari by the Supreme Court of the United States.

ARGUMENT

The Trial Judge in denying Petitioner's bail pending appeal articulated no reason justifying his denial. The only

statement made by the Court was "Mr. Samuel, due to the nature of this offense, I think the consequences of the crime should begin today. I'm going to deny your request for bail." (Appendix, Page 1; Transcript of Proceeding Page 12).

In Sellers v. United States, 21 L. Ed. 2d 64, 66, 89 S. Ct. 36 (1968) this Court stated "the command of the eighth amendment that excessive bail shall not be required . . . at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons."

In Virginia, the primary test for determining whether a defendant should be released following a felony conviction requires the trial court to consider whether the defendant will appear for hearing or such other time and place as may be directed and whether the defendant's liberty constitutes an unreasonable danger to herself and the

public. Virginia Code Section 19.2-120 and 19.2-319; Donnell v. Commonwealth, 6 Va. App. 225 (1988).

In the case at bar, the Petitioner was released on a personal recognizance bond on the date of her arrest, November 1, 1987. She remained free on bond without incident until her incarceration on July 7, 1988. She was again released on August 1, 1988 on a Twenty-five Thousand Dollar ($25,000.00) surety bond when the Court of Appeals determined that the trial judge improperly denied bail. She remains on bail pending the resolution of this petition and/or appeal of her criminal conviction to the Court of Appeals of Virginia.

The Petitioner is gainfully employed, is taking classes at a local community college and resides and cares for her three infant children. She has no prior record for a crime of violence. It was uncontested in the Court below that the

Petitioner had been the victim of extreme spousal abuse to the extent that she suffers from Post Traumatic Stress Syndrome and this syndrome provided explanation for the violence that resulted in the death of her husband.

Petitioner recognizes that a final consideration regarding bail is whether or not the appeal of her underlying conviction is frivolous. Petitioner's brief to the Court of Appeals has been filed (Appendix, Page 11) which sets out the compelling reasons why her appeal is not frivolous.

There was no basis for denying the Petitioner's bail pending appeal by the Trial Court. The uncontradicted facts are that the Petitioner meets the standards established by the applicable Virginia Code Sections and supporting Federal Constitutional Authorities. By denying her bail her constitutional rights pursuant to the Eighth Amendment have been violated in that the

excessive bail and cruel and unusual punishment mandates have been violated. By denying bail without justification, the Petitioner had been denied her liberty without due process of law pursuant to the Fifth Amendment of the United States Constitution.

There is very little authority in Virginia pertaining to post-trial bail pending appeal. The conflicting decisions of the Virginia Court of Appeals and the Supreme Court of Virginia in this case creates confusion as to the appropriate standard to be applied in the conviction post-bail context. If the Petitioner's constitutional rights are allowed to be violated numerous other similarly situated individuals are going to find their rights unconstitutionally violated as well.

CONCLUSION

For the reasons set forth above, it is submitted that this Petition for Writ of Certiorari should be granted.

PROOF OF SERVICE

I, Robert L. Samuel, Jr., one of the attorneys for the Petitioner herein, and a member of the bar of the Supreme Court of the United States hereby certify that on the 5th day of January, 1989 I hand delivered three (3) copies of the foregoing Petition for Writ of Certiorari to all parties to this proceeding as follows: on the Commonwealth Attorneys Office for the City of Virginia Beach, by hand delivery to Assistant Commonwealth's Attorney George Yates a copy to his office, to-wit:

George Yates, Assistant
Commonwealth Attorney
Commonwealth Attorney's Office
City of Virginia Beach
Municipal Center
Virginia Beach, Virginia 23456

AFFIDAVIT FOR PROOF OF MAILING

I, Robert L. Samuel, Jr., one of the attorneys for the Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 5th day of January, 1989 I hand delivered by courier to the Clerk of the Supreme Court of the United States within the time allowed for filing, the foregoing Petition for Writ of Certiorari.

Robert L. Samuel, Jr.

Signed and sworn before me, at Virginia Beach, Virginia, this 5th day of January, 1989.

Lorraine Jordana
Notary Public

My commission expires: 11/13/92

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DEBRA JO WILMOTH

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

APPENDIX

Robert L. Samuel, Jr.
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TABLE OF CONTENTS

	Page
Transcript of Proceedings	1
Order Deferring Issuance of Mandate.	2
Judgment Appealed From.	3
Related Decisions Below	4-8
Code of Virginia § 19.2-319	9
Code of Virginia § 19.2-120	10
Petition for Appeal in Virginia Court of Appeals	11

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA

EXCERPT

v

CR88-599

DEBRA JO WlLMOTH,

Defendant

Before Hon. Alan E. Rosenblatt, Judge,
Virginia Beach, Virginia,

July 7, 1988.

-----oOo-----

APPEARANCES: Mrs. Cathleen M. Pritchard and Mr. George H. Yates, Assistant Commonwealth's Attorneys.

Messrs. Clark and Stant (Mr. Robert L. Samuel, Jr.), attorneys for the defendant.

THE COURT: Please stand up, Mrs. Wilmoth.

Mrs. Wilmoth, in accordance with the verdict of the jury, the Court is going to find you guilty of voluntary manslaughter. Before I sentence you, is there anything you want to say?

THE DEFENDANT: No, Your Honor.

THE COURT: Mrs. Wilmoth, it's impossible to hear your story and not feel some sympathy for you. You wouldn't be human if you didn't feel sympathy, but all the sympathy in the world doesn't legally justify your actions. This was a lengthy trial. The jury heard everything that you and Mr. Samuel and Mr. Swain had to present.

Despite my misgivings, the jury heard in its totality the testimony of Doctor Pelfrey. Frankly, I -- It was argued against by the Commonwealth, and I had some question

about its admissibility, but I thought under the circumstances of this case it would be fair to let the jury hear that testimony.

In my opinion, the evidence that was presented to this jury would have supported a conviction for first degree murder Mrs. Wilmoth. I didn't believe your testimony, and I don't think the jury believed your testimony. I'm not criticizing the jury for their verdict. I think they did a good job. I think they were a conscientious group, and I think I can understand why they reached the verdict they reached and recommended the punishment they recommended.

I want you to understand this, Mrs. Wilmoth, because I think you should understand that you've already been treated lenient by this jury. The argument is made -- Well, actually, as I understand it, there are basically two arguments. One is, Don't

send you to the penitentiary; think of your children. As far as this Court's concerned, your absence from your children is just one more thing I hope they find in their hearts to forgive you for. That's going to be your problem when you get out.

The other argument that allowing you to remain free will give you the opportunity to work with other people who may be suffering similar problems -- If you don't understand the consequences of your actions, Mrs. Wilmoth, and understand your responsibility for what you did, and I have some real doubts in my mind as to whether you do or not, there may be other people in the community like you, and I can't think of a worse message that we could send than for me to suspend any portion of this penitentiary sentence. If nothing else, I hope the message is sent out and is received that personal

problems can't be resolved by violence under any circumstances.

Mrs. Wilmoth, in accordance with the recommendation of the jury, the Court is going to sentence you to ten years in the Virginia State Penitentiary.

Mr. Samuel.

MR. SAMUEL: Your Honor, I have nothing to say about that because I've argued, but the defendant is going to appeal; and pursuant to 19.2-319 I'd ask the Court to suspend execution of the sentence and to allow her to remain free on bond pending the appeal. I think there's certain factors that are relative to that. Of course, if you'll hear from me now, I'll be glad to go forward.

THE COURT: Have a seat Mrs. Wilmoth.

This is the time.

MR. SAMUEL: Yes, sir. I recognize we're in a different posture than we were before she was convicted, but I do point out to the Court that she has been on bond since November 1st, 1987. She has made every court appearance. She has not had any -- there's no scintilla -- there's no evidence and there isn't any because there isn't any basis. She has been a law-abiding citizen.

The fact that the jury -- I understand the Court's feeling, Your Honor, about what the evidence was; but the jury did not find her guilty of murder. They found her guilty of involuntary manslaughter, and I think this is as important a reason as any. The section I'm referring to -- 19.2-319 -- indicates that the Court shall postpone the execution of such sentence for such time as it may deem proper and that you may consider the propriety of bail. And there's been some

cases in this area where a man received forty years, and the actual case is Commonwealth versus Smith, 230 Va. 354, but I don't ask the Court to read that case.

In that case a man received forty years for a drug conviction; that there was evidence that he had been charged with assaulting a witness for the prosecution. He had previously escaped from custody, so he obviously had a prior record, and he had no occupation. Well, the Court of Appeals, believe it or not, held that it was abusive discretion for the trial judge not to grant bail in that case, and the Supreme Court reversed the Court of Appeals saying under the facts of that case the trial judge did not abuse his discretion.

Well, Your Honor, we don't know what an appeal is going to mean in this case as far as what the Court of Appeals is ulti-

mately going to do in the case, but it would be -- and we don't know. Perhaps there will be a writ granted, perhaps there will be a new trial, perhaps they will affirm the jury's verdict; but we don't know that; but it's a defendant's right to appeal.

If you do not grant bail and don't allow her to remain free, in effect as far as punishment is concerned -- and that's certainly a very real issue, the act of incarceration of an individual, the denial of their liberty -- she may have served her sentence which may or may not be a concern of this Court, but it's certainly a concern of mine -- I would expect it to be a concern of the Court -- before the Court of Appeals makes this decision.

Now, what if they remand the case back for a new trial and she's served two-thirds of her sentence and another jury finds

her not guilty. Now, a jury perhaps could do that; perhaps not. But if the Court of Appeals denies the appeal in a year from now, then she's going to have to serve the ten year sentence. So society is not going to be deprived of any aspect of what is fair in the case by her remaining free pending a decision by the appellate court; and I would ask the Court to allow her to remain free on bond.

I think there's some significant issues, and it's not for me to state to the Court now, but there are issues in any trial, and there's some significant issues in this case. I recognize you allowed Michael Pelfrey to testify, but there are other issues in the case as far as pre-trial publicity and facts that occurred during the course of the trial, and I think under all the circumstances it would be manifestly

unfair not to allow her to remain free pending the appeal.

And I know I'm repeating myself, but I think it's important as far as sending a message to anybody. If -- Now, she's been free since November 1st. If the Court of Appeals decides that she is to serve the ten year sentence and there was no error in the trial, then she's going to have to serve the full sentence when that time comes. But if they don't and there's a new trial, then she will have been incarcerated; and the effect of it as far as her liberty is concerned, and liberty is a very precious right, will be eliminated; and I don't think society is hurt by allowing the appeal process to work itself through.

She's not guilty of murder. She's guilty of manslaughter. You can see that any criminal history she's had was ten years

ago when she was much younger, and there's no evidence of any problems in the near future and there wouldn't be. She's a lifelong resident of this area. She continues to work. She continues to take care of her children, and so we're not dealing with someone who is acting totally irresponsibly under the circumstances. She is in counseling, will continue to get counseling; and, of course, pending the appeal she would have to do whatever the Court would require her to do pending that appeal; and she's not going to go anywhere because if she was going to go somewhere she would have gone long before now.

MR. YATES: Your Honor, as the Court well knows, the issue here is one that is up to the Court, and the issue of bond is one that is in the sound judicial discretion of His Honor based upon 19.2-319. Mr. Samuel

has stated absolutely no questions before the Court which might be a basis for appeal; and any appeal in this case, as Your Honor probably knows from the way this case was handled, is merely delaying the inevitable; and this defendant will serve all of that time.

Commonwealth's position is let justice begin. The jury has spoken, and let the defendant begin serving her sentence. The Commonwealth versus Smith case, 230 Va. 354, which Mr. Samuel has cited -- In that case the court denied bail to a defendant who had had no problems in the nine months leading up to trial and had extensive family ties to the community; but based upon the nature of the crime itself, the court in the Smith case -- the trial court in the Smith case denied bail pending appeal, and that decision was upheld by the Supreme Court.

Commonwealth's position is that once again it would be merely delaying the inevitable to not remand the defendant to custody and deny bond at this time pending appeal.

THE COURT: Mr. Samuel, due to the nature of this offense, I think that the consequences of the crime should begin today. I'm going to deny your request for bail.

MR. SAMUEL: Your Honor, I --

THE COURT: Mrs. Wilmoth will be remanded to the custody of the sheriff. Execution of the sentence, however, will be suspended conditioned upon your filing the appropriate appeal.

MR. SAMUEL: Well, Judge, I would ask one indulgence by the Court. I think this would be fair. We're going to obviously note an appeal to the Court of Appeals regarding your decision as to bail which would be expeditiously heard, and it's done in the

federal court all the time and it should be heard within -- can't she remain free pending --

THE COURT: No, sir, she's going to be remanded today. Anything else?

Take her into custody, Bailiff.

REPORTER'S CERTIFICATE

STATE OF VIRGINIA,
CITY OF VIRGINIA BEACH, to-wit:

I, Marion Adams, court reporter, certify that the foregoing is a correct transcript of the proceedings had before the said court on the date aforementioned.

Given under my hand this 8th day of July, 1988.

/s/ Marion Adams
Court Reporter

-----oOo-----

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA
Held at the Supreme Court Building in the City of Richmond on Tuesday the 15th day of November, 1988.

COMMONWEALTH OF VIRGINIA, Appellant,

against Record No. 880878
Court of Appeals No. 0926-88-1

Debra Jo Wilmoth, Appellee.

ORDER DEFERRING ISSUANCE OF MANDATE

On November 3, 1988 came the appellee, by counsel, and filed a motion to defer issuance of the mandate in this case.

Thereupon came the appellant, by counsel, and filed an objection to said motion.

On consideration whereof, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to an including the 19th day of January, 1989, on the expiration of which time the same may be issued, unless the case has been before

that time docketed in the Supreme Court of the United States, in which event issuance thereof shall be deferred until the final determination of the case by that Court.

A Copy,
Teste:

/s/ David B. Beach, Clerk

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA
Held at the Supreme Court Building in the City of Richmond on Friday the 21st day of October, 1988.

COMMONWEALTH OF VIRGINIA, Appellant,

against Record No. 880878
Court of Appeals No. 0926-88-1

Debra Jo Wilmoth, Appellee.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 22nd day of September, 1988 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

/s/ David B. Beach, Clerk

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA on Tuesday the 27th day of September, 1988.

Debra Jo Wilmoth, Appellant,

against Record No. 0926-88-1

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

It appears that there is currently pending before the Supreme Court of Virginia a petition for rehearing concerning bond. Accordingly, the order entered herein on September 27, 1988 is stayed pending resolution of the said petition for rehearing.

A Copy,
Teste:

/s/ David B. Beach, Clerk
By: Patricia A. Davis,
Deputy Clerk

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA on Monday the 26th day of September, 1988.

Debra Jo Wilmoth, Appellant,

against Record No. 0926-88-1

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Chief Judge Koontz, Judges Hodges and Moon

In accordance with the order of the Supreme Court of Virginia entered September 22, 1988, the bond set by this Court on July 29, 1988 is hereby revoked.

A Copy,
Teste:

/s/ David B. Beach, Clerk
By: Patricia A. Davis,
Deputy Clerk

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA Held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of September, 1988.

COMMONWEALTH OF VIRGINIA, Appellant,

against Record No. 880878
Court of Appeals No. 0926-88-1

Debra Jo Wilmoth, Appellee.

From The Court of Appeals of Virginia

Upon consideration of the papers filed herein, the Court is of the opinion the Court of Appeals of Virginia erred in admitting the appellee to bond pending her appeal. Code § 19.2-319; Commonwealth v. Smith, 230 Va. 354, 363, 337 S.E.2d 278, 283 (1985).

Accordingly, the judgment of the Court of Appeals of Virginia is reversed and the case remanded to the said Court of Appeals for revocation of the appellee's bond.

A Copy,
Teste:

/s/ David B. Beach, Clerk

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA on Wednesday the 17th day of August, 1988.

Debra Jo Wilmoth, Appellant,

against Record No. 0926-88-1

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Chief Judge Koontz, Judges Hodges and Moon

On August 3, 1988 came the appellee, by counsel, and filed a motion praying that the Court reconsider its order entered herein on July 29, 1988.

Upon consideration whereof, the said motion is denied.

A Copy,
Teste:

/s/ David B. Beach, Clerk
By: Patricia A. Davis,
Deputy Clerk

VIRGINIA: IN THE COURT OF APPEALS OF VIRGINIA on Friday the 29th day of July, 1988.

Debra Jo Wilmoth, Appellant,

against Record No. 0926-88-1

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Chief Judge Koontz, Judges Hodges and Moon

On July 11, 1988 came the appellant, by counsel, and filed a motion praying that this Court review the trial court's denial of bond pending appeal of this case, to which the appellee filed an objection, and the same was argued by counsel.

An appellant is entitled to post bond pending appeal unless the trial court states as a reason for the denial words to the effect that (1) appellant will not appear

in the future as may be directed; or (2) Code § 19.2-120.

It appearing to the Court that the trial judge did not state one of the aforesaid reasons for denying bond and that the evidence does not support such a finding as to either cause, the Court finds that the trial court abused its discretion in denying bail to appellant pending appeal.

Accordingly, pursuant to Code § 19.2-319 and in accordance with the factors set forth in Code § 19.2-120, it is ordered that bond for appellant pending final determination of her appeal be, and is hereby, set at $25,000 with surety, and conditioned upon the personal appearance of Debra Jo Wilmoth before the trial court at such times as may be fixed by further order of that court, and

of the further condition that Debra Jo Wilmoth shall not depart this Commonwealth without leave of Court, and she shall keep the peace and be of good behavior.

This order shall be mailed to the clerk of the trial court, counsel for the parties, and the Sheriff of the City of Virginia Beach.

A Copy,
Teste:

/s/ David B. Beach, Clerk
By: Cynthia L. McCoy
Deputy Clerk

SECTION 19.2-319 - When execution of sentence to be suspended; bail; appeal from denial. - If a person sentenced by a circuit court to death or confinement in the state correctional facility indicates an intention to apply for a writ of error, the circuit court shall postpone the execution of such sentence for such time as it may deem proper.

In any other criminal case wherein judgment is given by any court to which a writ of error lies, and in any case of judgment for any civil or criminal contempt, from which an appeal may be taken or to which a writ of error lies, the court giving such judgment may postpone the execution thereof for such time and on such terms as it deems proper.

In any case after conviction if the sentence, or the execution thereof, is suspended in accordance with this section, or for any other cause, the court, or the judge thereof, may, and in any case of a misdemeanor shall, set bail in such penalty and for appearance at such time as the nature of the case may require.

In any case in which the court denies bail, the reason for such denial shall be stated on the record of the case. A writ of error from the Court of Appeals shall lie to any such judgment refusing bail or requiring excessive bail, except that in any case where a person has been sentenced to death, a writ of error shall lie from the Supreme Court. Upon review by the Court of Appeals or the

SECTION 19.2-120. Right to bail; use to satisfy fines and cost. - An accused, or juvenile taken into custody pursuant to § 16.1-246 who is held in custody pending trial or hearing for an offense, civil or criminal contempt, or otherwise shall be admitted to bail by a judicial officer as defined in § 19.2-119, unless there is probable cause to believe that:

1. He will not appear for trial or hearing or at such other time and place as may be directed, or

2. His liberty will constitute an unreasonable danger to himself or the public.

In any case where the accused has appeared and otherwise met the conditions of bail, the bail shall not be used to satisfy fines and costs unless agreed to by the person who posted the bail. (1975, c.495; 1978, c.755; 1979, c.649; 1987, c.390.)

IN THE

VIRGINIA COURT OF APPEALS

RECORD NO. 880878

COURT OF APPEALS NO. 0926-88-1

DEBRA JO WILMOTH,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

PETITION FOR APPEAL

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
NATURE OF CASE AND PROCEEDINGS IN TRIAL COURT	1
ASSIGNMENT OF ERROR	3
STATEMENTS OF FACTS	4
ARGUMENT	7
CONCLUSION	26
CERTIFICATE PURSUANT TO RULE 5A:12	27

TABLE OF CITATIONS

FEDERAL CONSTITUTION	PAGE
United States Constitution, Amendment VI	8
United States Constitution, Amendment XIV	8

VIRGINIA CONSTITUTION	PAGE
Virginia Constitution, Article I, § 8	8

FEDERAL CASES	PAGE
Beck v. Washington, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955, reh. den., 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1575 (1962)	18, 20
Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 244, 97 S. Ct. 2290, reh. den., 434 U.S. 882, 54 L. Ed. 2d 166, 98 S. Ct. 246 (1977)	11, 17

Gannett Co. v. DePasquale,
443 U.S. 368, 61 L. Ed. 608,
99 S. Ct. 2898 (1979) 15

In re Murchison,
349 U.S. 133, 99 L. Ed. 942,
75 S. Ct. 623 (1955) 13

Irvin v. Dowd,
366 U.S. 717, 6 L. Ed. 2d 751,
81 S. Ct. 1639 (1961). 7, 8, 11
. . . . . 16, 17

Marshall v. United States,
360 U.S. 310, 3 L. Ed. 2d 1250,
79 S. Ct. 1171 (1959). 19, 21, 26

Patterson v. Colorado,
205 U.S. 454, 51 L. Ed. 879,
27 S. Ct. 556 (1907) 12

Patton v. Yount,
467 U.S. 1025, 81 L. Ed. 2d 847,
104 S. Ct. 2885 (1984) 17

Sheppard v. Maxwell,
384 U.S. 333, 16 L. Ed. 2d 600,
86 S. Ct. 1507 (1966). 12, 19

Turner v. Louisiana,
379 U.S. 466, 13 L. Ed. 2d 424,
85 S. Ct. 546 (1965) 8

Holmes v. United States,
284 F.2d 716, (1960) 21, 26

United States v. Milanovich,
303 F.2d 626 (4th Cir.), cert. den.,
371 U.S. 876, 9 L. Ed. 2d 115,
83 S. Ct. 145 (1962) 18

VIRGINIA CASES PAGE

Abdell v. Commonwealth,
173 Va. 458, 2 S.E.2d 293 (1939) .17, 18

Ballard v. Commonwealth,
156 Va. 980, 159 S.E. 222 (1931) . 16

Barker v. Commonwealth,
230 Va. 370, 337 S.E.2d 729 (1985) 25

Charlottesville Music Center, Inc.
v. McCray, 215 Va. 31, 205 S.E.2d
674 (1974) 8

Educational Books, Inc. v. Commonwealth,
3 Va. App. 384, 349 S.E.2d 903
(1986) 16, 24

Gilchrist v. Commonwealth,
227 Va. 540, 317 S.E.2d 784 (1984)10, 14

Justus v. Commonwealth,
220 Va. 971, 266 S.E.2d 87 (1980),
appeal after remand, 222 Va. 667,
283 S.E.2d 905 (1981), cert. den.,
455 U.S. 983, 102 S. Ct. 1491,
71 L. Ed. 2d 693 (1982) 25

Lomax v. Commonwealth,
228 Va. 168, 319 S.E.2d 763 (1984) 10

Martin v. Commonwealth,
221 Va. 436, 271 S.E.2d 123 (1980) 7, 18

Myers and Axtell, Receivers v. Trice,
86 Va. 835, 11 S.E. 428 (1890) . . 14

Poyner v. Commonwealth,
229 Va. 401, 329 S.E.2d 815, cert. den.,
474 U.S. 865, 88 L. Ed. 2d 158,
106 S. Ct. 189, and cert. den.,
474 U.S. 888, 88 L. Ed. 2d 178,
106 S. Ct. 208 (1985) 10

Salina v. Commonwealth,
217 Va. 92, 225 S.E.2d 199 (1976). 15

Scott v. Commonwealth,
1 Va. App. 447, 339 S.E.2d
899 (1986), aff'd, 233 Va. 5,
353 S.E.2d 460 (1987) 15, 18

Thompson v. Commonwealth,
219 Va. 498, 247 S.E.2d 707 (1978)19, 20

Townes v. Commonwealth,
234 Va. 307, 362 S.E.2d 650 (1987),
cert. den., ___ U.S. ___, 108
S. Ct. 1249, 99 L. Ed. 2d 447 (1988) 9

Wright v. Commonwealth,
73 Va. (32 Gratt.) 941 25

OTHER AUTHORITIES PAGE

Annotation, Pretrial Publicity in Criminal Case as Affecting Defendant's Right to Fair Trial--Federal Cases, 10 L. Ed. 2d 1243 24

THE NATURE OF THE CASE AND PROCEEDINGS IN TRIAL COURT

Debra Jo Wilmoth was indicted by a Virginia Beach grand jury in March, 1988, charging her with the first degree murder of her husband. Trial by jury began in the Circuit Court for the City of Virginia Beach on May 31, 1988, The Honorable Allen E. Rosenblatt, the presiding judge. On June 9, 1988, the jury returned a verdict of guilty to the lesser-included offense of voluntary manslaughter and recommended a ten year penitentiary sentence. Mrs. Wilmoth requested a presentence evaluation returnable July 7, 1988. At sentencing, the trial judge imposed the ten (10) year sentence and denied Ms. Wilmoth's request for bail. On July 11, 1988, Mrs. Wilmoth filed a motion for review of denial of bond which was sustained by the Court of Appeals on July 29, 1988. The Commonwealth of Virginia noted its appeal. By Order dated September 22, 1988, the

Supreme Court of Virginia reversed the Court of Appeals and remanded the case for revocation of her bond. The Court of Appeals by order dated September 27, 1988 granted Mrs. Wilmoth's motion for Stay of Proceedings pending the Supreme Court of Virginia's consideration of her Petition for Rehearing. On October 21, 1988 the Supreme Court denied Mrs. Wilmoth's Petition for Rehearing.

Prior to voir dire, counsel for Mrs. Wilmoth moved for a change of venue or, in the alternative, a continuance in light of prejudicial pretrial publicity resulting from a front page article appearing in the local newspaper two days before trial. Both motions were overruled. During voir dire, defendant moved to exclude from the venire anyone whom had read the article. This motion was also overruled. Finally, defendant moved to strike for cause individual veniremen whom had read the article.

Defendant timely noted an appeal within 30 days of entry of final judgment pursuant to Rule 5A:6 if the Rules of the Virginia Supreme Court.

References to the trial transcript will be noted as (T, ___).

ASSIGNMENT OF ERROR

1. The trial court erred in overruling the defendant's motion for a continuance.

2. The trial court erred in refusing to exclude from the venire those whom had read the newspaper article containing prejudical and inadmissible information.

3. The trial court erred in overruling the defendant's motions to strike for cause those prospective jurors who had read the newspaper article containing prejudical and inadmissible information.

QUESTIONS PRESENTED

1. Whether the trial court erred in overruling the defendant's motion for a continuance in light of prejudical pretrial publicity disclosing evidence which would be inadmissible if offered at trial? (Assignment of Error 1)

2. Whether the trial court erred in permitting those veniremen who had read a prejudical newspaper article, which appeared two days before trial and contained inadmissible and prejudicial evidence, to remain on the panel of prospective jurors? (Assignments of Error 2 and 3)

STATEMENT OF FACTS

On November 1, 1987, Debra Jo Wilmoth stabbed and killed her husband, Michael. There was evidence that this incident was the result of an often stormy marriage during which Michael Wilmoth physically and mentally abused his wife. The primary defense theory at trial, supported by

expert testimony, was that Mrs. Wilmoth's actions were in part due to the effects of the "battered wife syndrome." In short, the defense sought to show that Mrs. Wilmoth acted in self-defense when she killed her husband out of fear that he was going to kill her the night of November 1, 1987 in continuation of the abuses inflicted upon her the past several years.

Two days prior to the trial, on Sunday, May 29, 1988, the local newspaper featured a front-page article about the case. This article appeared at the top of the page, in the "headline" location, and extended over all five columns before continuing onto an interior page. Among other things, the article contained statements, attributed to friends and neighbors, concerning the Wilmoth's violent relationship. Also quoted, and featured in large type just under the headline, was a statement alleged to have been made by Michael Wilmoth two weeks before

the incident, which read, "One of these days, either she'll kill me or I'll kill her." Further, the newspaper article contained a dramatic, and slanted, re-creation of the events of October 31, 1987 leading up to the stabbing. At several points, the writer of the story raised questions concerning both Mrs. Wilmoth's recollection of the incident and the plausibility of the self-defense theory, and noted that "[p]rosecutors George Yates and Cathleen Pritchard maintain that Wilmoth's case strains the limits of the self-defense exception...." Finally, the article contained information and evidence which would have been clearly inadmissible if offered at trial. Among this inadmissible material was an assertion that the defendant had failed a polygraph test "before confessing that she had stabbed her husband in his sleep[.]"

Even though the trial court recognized that "the actions of the paper are

totally irresponsible in this sort of situation," (T, 14) defendant's motions for a change of venue or, in the alternative, for a continuance were overruled. (T, 15). Defense counsel also asked that any veniremen who had read the article be excluded from the panel; this request was refused. (T, 30). During voir dire, defendant moved to strike for cause several prospective jurors whom had read and remembered the article. Most of these motions to strike were overruled (T at 128, 157, 208, 217, 231, 275), with the result that the twelve member jury contained four persons who had been exposed to the prejudicial and incompetent information appearing in the story.

On June 9, 1988, Mrs. Wilmoth was convicted by the jury of voluntary manslaughter with a recommended sentence of 10 years in the penitentiary. After consideration of a presentence report and oral testimony the court imposed the recommended

sentence on July 7, 1988.

ARGUMENT

A criminal defendant has a constitutional right to a fair trial by an impartial jury. Irvin v. Dowd, 366 U.S. 717, ___, 6 L. Ed. 2d 751, 755, 81 S. Ct. 1639, ___ (1961); Martin v. Commonwealth, 221 Va. 436, 444, 271 S.E.2d 123, 128 (1980) ("... an accused is entitled to an impartial jury as a matter of constitutional guarantee, reinforced by legislative mandate and by the Rules of ... court" (footnotes omitted)); see also, U.S. Const. amends VI and XIV; Va. Const. Art. I, §8. This right demands that the case against the defendant be resolved only on evidence adduced in court at trial. Turner v. Louisiana, 379 U.S. 466, 472, 13 L. Ed. 2d 424, ___, 85 S. Ct. 546, 549 (1965); Irvin, 366 U.S. at 722, 6 L. Ed. 2d at 755. It is not necessary, however, that jurors be "totally ignorant of the facts and issues involved [in a case]." Irvin, 366 U.S. at

722, 6 L. Ed. 2d at 756; Charlottesville Music Center, Inc. v. McCray, 215 Va. 31, 38, 205 S.E.2d 674, ____ (1974) (citation omitted).

In the instant case, Judge Rosenblatt inadequately controlled the influence of pretrial publicity, thus depriving Debra Jo Wilmoth of a fair trial. The article published by The Virginian-Pilot and The Ledger-Star on May 29, 1988 was not merely factual or issue-oriented. Rather, it was a story, written in a manner intended to raise serious doubts regarding the credibility of the defendant by presenting hearsay evidence and details of the police investigation which would have been clearly inadmissible if offered at trial. By refusing the defendant's motion for a continuance and allowing those whom had read the article to remain on the panel of prospective jurors, the trial court engendered a trial setting of questionable fairness and impartiality.

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE BASED ON PREJUDICIAL PRETRIAL PUBLICITY.

Generally, the grant or denial of a motion for a continuance is within the sound discretion of the trial court. e.g., Townes v. Commonwealth, 234 Va. 307, ___, 362 S.E.2d 650, ___ (1987), cert. den., ___ U.S. ___, 99 L. Ed. 2d 447, 108 S. Ct. 1249 (1988). As such, the decision "will not be reversed on appeal absent an abuse of that discretion." Poyner v. Commonwealth, 229 Va. 401, 412-13, 329 S.E.2d 815, ____, cert. den., 474 U.S. 865, 88 L. Ed. 2d 158, 106 S. Ct. 189, and cert. den., 474 U.S. 888, 88 L. Ed. 2d 178, 106 S. Ct. 208 (1985). In determining whether to grant a continuance, however, "[a] court must not exercise its discretion in a manner which would deny an accused a fair and impartial trial ...." Lomax v. Commonwealth, 228 Va. 168, 172, 319 S.E.2d 763, ___ (1984) (court abused its discretion and violated

defendant's constitutional right "to call for evidence in his favor" by refusing continuance request where state produced discovery materials two days prior to trial); Gilchrist v. Commonwealth, 227 Va. 540, 546, 317 S.E.2d 784, ___ (1984) (where a defendant's due process rights to discover evidence and have a reasonable time thereafter to prepare for trial were violated, trial court should have continued the case). Judge Rosenblatt abused his discretion in overruling defendant's motion for a continuance where, on the eve of trial, a highly prejudicial front-page article containing incompetent information made it impossible that the defendant would receive "a fair and impartial trial."

It is perhaps inevitable that a case such as this, involving the killing of one spouse by another under the set of circumstances here present, would attract widespread publicity. Cf., Dobbert v. Florida, 432 U.S. 282, 303, 53 L. Ed. 2d 344,

362, 97 S. Ct. 2290, ___, reh. den., 434 U.S. 882, 54 L. Ed. 2d 166, 98 S. Ct. 246 (1977) ("One who is reasonably suspected of murdering his children cannot expect to remain anonymous"). The reality of swift and extensive media coverage of notorious incidents, however, does not justify actions on the part of the trial court which effectively compromise what the Irvin court termed "the undeviating rule" that:

> the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. Colorado, 205 U.S. 454, 462, 51 L. Ed. 2d 879, 881, 27 S. Ct. 556, ____ (1907).

In a case not unlike the present, the United States Supreme Court granted habeas corpus relief to a man convicted of murdering his wife where the trial judge failed to control or remedy the effects of

prejudicial publicity, thus violating the defendant's due process rights. Sheppard v. Maxwell, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966) (publicity concerned, among other things, the accused's failure to take a lie detector test). The words of the court concerning the duties of the trial court are persuasive:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances .... [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.

Id., 384 U.S. at 362-63, 16 L. Ed. 2d at 620 (emphasis added); see also, In re Murchison,

349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955) ("[o]ur system of law has always endeavored to prevent even the probability of unfairness"). Significantly, the Supreme Court noted the possible necessity of a continuance even though the defendant failed to request one at trial.

The local newspaper cast doubts on Debra Jo Wilmoth's credibility and motivation two days before her trial on a charge of first degree murder. The article endangered Mrs. Wilmoth's right to a fair trial further by publishing information which could not be admitted as evidence in court, including the fact that she had failed a lie detector test three times before confessing to the killing. Notwithstanding such prejudicial publicity, the trial court refused to continue the case until such time as a fair trial for the defendant could be guaranteed. By doing so, Judge Rosenblatt clearly abused his discretion:

> When a court has no reason to believe that a motion for a continuance is spurious, it should seriously consider whether a failure to grant the continuance may "imperil the just determination of the cause."

Gilchrist, 227 Va. at 546 (citing, Myers and Axtell, Receivers v. Trice, 86 Va. 835, 11 S.E. 428 (1890).

> II. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE FROM THE JURY PANEL VENIREMEN WHOM HAD READ A NEWSPAPER ARTICLE APPEARING TWO DAYS BEFORE TRIAL AND CONTAINING INADMISSIBLE PREJUDICIAL EVIDENCE.

Of the twenty veniremen assembled for Mrs. Wilmoth's trial, nine admitted to having read the article containing inadmissible evidence. (T, 67-68). The judge below refused to automatically exclude them, notwithstanding defense counsel's argument that

> "[i]t seems to me in a city of 375,000 people, we can start out with twenty members who have not read the article and clear up all the possibility and probability of a taint. We have ten who haven't read it. If you put in ten more people who haven't read the article, and then we have an easy time of picking the jury, and then Debra Wilmoth can

> get a fair trial, but as long as the jurors know this information and have read it who are going to sit on the jury, she can't get a fair trial, Judge."

(T, 138). In so doing, and in overruling several of the defendant's motions to excuse individual jurors for cause on the same basis, Judge Rosenblatt violated his affirmative duties to procure an impartial jury, Salina v. Commonwealth, 217 Va. 92, 225 S.E.2d 199 (1976); Scott v. Commonwealth, 1 Va. App. 447, 339 S.E.2d 899 (1986), aff'd, 233 Va. 5, 353 S.E.2d 460 (1987), and to minimize the effects of prejudicial pretrial publicity. Gannett Co. v. DePasquale, 443 U.S. 368, 378, 61 L. Ed. 2d 608, 620, 99 S. Ct. 2398, ___ (1979).

A juror is impartial if he/she "stand[s] indifferent to the cause." Educational Books, Inc. v. Commonwealth, 3 Va. App. 384, 387, 349 S.E.2d 903, ____ (1986). However, "[i]t is sufficient if the juror can lay aside his impression or opinion

and render a verdict based on the evidence presented in court." Irvin, 366 U.S. at 723, 6 L. Ed. 2d at 756; see also, Ballard v. Commonwealth, 156 Va. 980, ___, 159 S.E. 222, 229 (1931), where the court stated:

> Most intelligent men and all educated men read newspapers, and they would have to be more than human if they did not form some opinion from accounts which they give of homicides like this, locally of intense interest to everybody. To reject them for this reason is to put a premium upon ignorance.

Id., 156 Va. at 999-1000. Whether or not given jurors in a specific case are able to lay aside any preconceived notion and determine the cause only upon evidence presented in court is judged in light of the facts and circumstances of each case. Irvin, 336 U.S. at 724-25, 6 L. Ed. 2d at 757 ("Impartiality ... is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula");

Abdell v. Commonwealth, 173 Va. 458, 463, 2 S.E.2d 293, ___ (1939).

In the absence of extreme publicity or an almost total lack of inquiry, appellate courts have generally found that the inclusion of jurors who have been exposed to pretrial publicity did not deprive the defendant of a fair trial. See, Patton v. Yount, 467 U.S. 1025, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984) (four years had elapsed between first trial and second trial, during which time "practically no publicity" had been given to case); Dobbert, 432 U.S. at 282, 53 L. Ed. 2d at 344, 97 S. Ct. at 2290 (not only was jury sequestered during trial, but court also permitted extensive voir dire by defense counsel and a comprehensive gag order was placed on all participants); Beck v. Washington, 369 U.S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955, reh. den., 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1575 (1962) (trial court excused all whom defendant challenged

for cause, and felt that the failure of the defendant to challenge others was evidence that he felt them not to be biased "notwithstanding wide adverse publicity by news media"); United States v. Milanovich, 303 F.2d 626 (4th Cir.), cert. den., 371 U.S. 876, 9 L. Ed. 2d 115, 83 S. Ct. 145 (1962) (trial judge offered a change of venue or continuance, which defendant refused). This is due, in part, to the discretionary power the trial court possesses in assembling an impartial jury. Martin, 221 Va. at 445; Scott, 1 Va. App. at 451.

The decision to overrule a motion to exclude a prospective juror for cause is entitled to great weight on appeal. Martin, 221 Va. at 445; Abdell, 173 Va. 463. Where the court refuses to exclude those who have been exposed to inadmissible evidence, however, it abuses its discretion such that a new trial should be ordered. See, Sheppard, 384 U.S. at 360, 16 L. Ed. 2d at 619 ("The

exclusion of such evidence [accused's refusal to undergo polygraph examination] in court is rendered meaningless when news media make it available to the public."); Marshall v. United States, 360 U.S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959).

"[B]ecause there can be no fixed rule which defines what constitutes prejudicial interference with a fair trial, each case must be decided on its special facts." Thompson v. Commonwealth, 219 Va. 498, 500, 247 S.E.2d 707, ___ (1978). In Thompson, the court found that the defendant was not entitled to a new trial where two jurors read a newspaper article containing the fact that, at the time of the murder for which he was being tried, the defendant was on five years unsupervised probation for rape. Although this evidence would have been inadmissible if offered by the prosecution, the court determined that no prejudice to the defendant resulted from the disclosure because all of

the potentially prejudicial information contained in the article, including the prior rape conviction, was brought out during trial. Id., 219 Va. at 505-06.

The Thompson court also recognized that "[s]ome publicity to which jurors have been exposed may be inherently prejudicial ...." Id., 219 Va. at 500. Clearly, revelation of the fact that Mrs. Wilmoth failed a polygraph examination before confessing to killing her husband as he slept falls within this category. Cf., Beck, 369 U.S. at 556, 8 L. Ed. 2d at ___, 82 S. Ct. at 963 (although purely factual news articles may not be prejudicial, those which are "invidious" do prejudice defendant). In a case similar to Thompson, the Supreme Court indicated its concern that a defendant not be prejudiced by such publicity:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice

> to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures.

Marshall, 360 U.S. at 312-13, 79 S. Ct. at 1173 (citation omitted) (new trial required where, during trial for unlicensed dispensing of drugs, some jurors read a news article concerning defendant's prior convictions for practicing medicine without a license). The Fourth Circuit has adopted the Marshall approach. Holmes v. United States, 284 F.2d 716 (4th Cir. 1960). "When it affirmatively appears ... that individual jurors have read newspaper articles containing information, incompetent if offered at trial, that the defendant had been previously guilty of criminal conduct, the Supreme Court has held that a new trial is mandatory." Id., at 718 (emphasis added).

Judge Rosenblatt below distinguished Marshall and Holmes on the ground that those

cases involved jurors, not prospective jurors, reading prejudicial newspaper articles during a trial. (T, 142). This, however, is a distinction without a difference. Indeed, the fact that in the instant case the jury had not been selected compounds the error on the part of the trial court. Here, there was at the time of the exposure no need for a new trial. Judge Rosenblatt had several different avenues open to him to ensure a fair trial, including a continuance and exclusion of those who had read the article. He chose none of them, thus depriving Debra Jo Wilmoth of a fair trial.

In overruling the defendant's motions for a change of venue, a continuance, or the exclusion from the venire of those whom had read the article, Judge Rosenblatt indicated that he would voir dire the potential jurors to determine if they were competent to serve. (T, 15). On voir dire, however, no questions were asked or allowed

concerning the contents of the newspaper article. Rather, the court asked the veniremen whether they "remembered" anything about the article or "made the connection" between the date of the upcoming trial and the possibility that they would be serving on that particular case, and whether they had discussed it with anyone. (T at 118-122, 210-212, 223-225). Upon being assured by each prospective juror that he/she had either formed no opinion or could decide the matter only upon evidence introduced in court, Judge Rosenblatt overruled the defendant's several motions to strike for cause. Significantly, the court did not permit defense counsel to inquire as to "the biggest fact she recalls from the article she read yesterday or the most salient impression she read from the article on Sunday." (T, 126). Thus, the court had no way of knowing whether or not any jurors had knowledge of inadmissible evidence before the trial. Because of this

any assurance that the potential juror could put aside any preconceived opinion is not at all rehabilitative:

> If the juror has seen or heard information which is either inadmissible in evidence or strongly slanted against the defendant, the effect of permitting the juror to sit as a trier of fact may be (1) to deprive the trial judge of effective control over the admission of evidence, or (2) to have the juror give more weight to testimony which is consistent with the publicity than to testimony which is not.

Annotation, Pretrial publicity in criminal case as affecting defendant's right to fair trial--federal cases, 10 L. Ed. 2d 1243, 1247 (footnote omitted).

The refusal to strike for cause certain panel members is even more questionable. It is well-settled in Virginia that "doubts as to the impartiality of a juror must be resolved in favor of the accused." Educational Books, 3 Va. App. at 387. The Virginia Supreme Court, in holding that the trial court erred in refusing to exclude

veniremen with knowledge of a defendant's conviction of a charge for which he was being retried, said:

> If there be a reasonable doubt whether the juror [is impartial and free from prejudice], that doubt is sufficient to ensure his exclusion. For ... it is not only important that justice should be impartially administered, but it should also flow through channels as free from suspicion as possible.

Barker v. Commonwealth, 230 Va. 370, 374-75, 337 S.E.2d 729, ___ (1985) (quoting Wright v. Commonwealth, 73 Va. (32 Gratt.) 941, 943 (1879)). In the instant case, there was at least a reasonable doubt as to whether or not the veniremen who had read the article were prejudiced thereby. One venireman who read the entire article, and ultimately served on the jury, stated that it would be "difficult" to "just disregard whatever I read." (T, 203-204). When it overruled the defendant's motion to strike this prospective juror for cause, the trial court abused its discretion and committed reversible error. Cf., Justus

v. Commonwealth, 220 Va. 971, 975, 226 S.E.2d 37, 90 (1980) (removal of juror by peremptory challenge is irrelevant to decision on appeal if the court erred in refusing a motion to strike for cause).

CONCLUSION

In light of the reasons stated and authorities cited, the case against Debra Jo Wilmoth should be remanded for a new trial. The disclosure of inadmissible and prejudicial evidence two days before trial, when coupled with the trial court's refusal to grant a continuance or exclude those veniremen whom had read the newspaper article making such disclosure, deprived Debra Jo Wilmoth of a fair and impartial trial. Contrary to the trial court's ruling, Holmes and Marshall are dispositive of the issues in this case. The defendant, therefore,

respectfully moves this court to reverse the court below and remand for a new trial.

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I, Robert L. Samuel, Jr., counsel for Debra Jo Wilmoth, certify, pursuant to Rule 5A:12 of the Court of Appeals of Virginia as follows: a copy of the Petition for Appeal has been mailed to the Commonwealth Attorney for the City of Virginia Beach and his Assistant, George H. Yates this 27th day of October, 1988.

Counsel desires to state orally the reason the Petition for Appeal should be granted.

_____

Robert L. Samuel, Jr.